United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 74 1872

To be argued by
MITCHEL B. CRANER

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-2154

SHOPMEN'S LOCAL UNION NO. 455,
INTERNATIONAL ASSOCIATION OF BRIDGE,
STRUCTURAL AND ORNAMENTAL IRON
WORKERS, A.F.L. - C.I.O.,

Appellant-Appellee,

-against-

KEVIN STEEL PRODUCTS, INC.,

Appellee-Appellant,

-and-

NATIONAL LABOR RELATIONS BOARD,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF OF APPELLEE-APPELLANT KEVIN STEEL PRODUCTS, INC.

GUAZZO, SILAGI & CRANER, P.C.
Attorneys for Appellee-Appellant
Office and Post Office Address
888 Seventh Avenue
New York, New York 10019
Telephone: (212) 757-7100

MITCHEL B. CRANER
STEPHEN E. KLAUSNER
Of Counsel

UNITED STATES COURT OF APPEALS
FILED
DEC 4 1974
DANIEL FUSARO, CLERK
SECOND CIRCUIT

Appeal Reproductions Inc., 217 Broadway, New York, N.Y. 10007
Tel: 233-6626

INDEX

	Page No.
Introduction	1
The Issue	3
Statement of the Case	3
Point	
The District Court Erred in Reversing the Order of the Bankruptcy Court Which Set Aside the Executory Portions of a Collective Bargaining Agreement	11
Conclusion	25

TABLE OF AUTHORITIES CITED

CASES

	Page No.
American Anthracite & Bituminous Coal Corp. vs. Leonardo Arrivabene S.A., 280 F. 2d 119 (2nd Cir. 1960)	11
American Meat Cutters vs. Connally 373 F. Supp. 737 (D.D.C. 1971)	24
Business Supplies Corp. of America, in the Matter of, 72 LC. ¶ 13,940 (S.D. N.Y. 1973) ..	16
Carpenters Local 2746 vs. Turney Wood Products, Inc., 289 F. Supp. 143 (W.D. Ark 1968)	13
Durand vs. NLRB, 296 F. Supp. 1049 (W.D. Ark 1969)	13
Freeman, In Re, 49 F. Supp. 163 (D.C. Ga. 1943) ...	24
IBEW, Local 11 vs. Boldt 475 F. 2d 1204 (TECA 1973)	24
Klabber, In Re. 173 F. Supp. 83 (S.D. N.Y. 1959) ..	11, 14, 16
Marie Conti Gowns, In Re, 12 F. Supp. 478 (S.D. N.Y. 1935)	13
Miracle Mart, In Re, 396 F. 2d 57 (2nd Cir. 1968)	11
Overseas National Airways, In Re, 238 F. Supp. 359 (E.D. N.Y. 1965)	15
Public Ledger, In Re, 63 F. Supp. 1008 (E.D. Pa. 1945) Rev'd on other grounds, 161 F. 2d 762 (3rd Cir., 1946)	12
Sunderland Incorporated 194 NLRB 118 (1971)	16
325 East Seventy-Second Street Inc., In Re, 57 F. Supp. 684 (S.D. N.Y. 1944)	24

STATUTUES

Bankruptcy Act Section 70(b), 11 U.S.C. § 110(b) 13

Bankruptcy Act Section 77(n), 11 U.S.C. § 205(n) 16, 20

Bankruptcy Act Section 116, 11 U.S.C. § 516 12

Bankruptcy Act Section 272, 11 U.S.C. § 672 15

Bankruptcy Act Section 313, 11 U.S.C. § 713 ..... 1, 8, 10, 11, 12, 14, 15, 20

Bankruptcy Act of 1898 Section 77(o) 47 Stat. 1474 ... 20, 22, 23

Bankruptcy Act of 1898 Section 77 B, 73 Cong. Public Law 251 21

Economic Stabilization Act of 1970, 12 U.S.C. § 1904-Note 23

Emergency Price Control Act of 1942, 50 U.S.C. App § 901 24

Fair Labor Standards Act § 13(b)(2), 29 U.S.C. § 213(b)(2) 22

Labor Management Relations Act of 1947 § 15, 29 U.S.C. § 165 15

National Labor Relations Act, 29 U.S.C. § 8(d), 29 U.S.C. § 158 (d) 23

Pension Reform Act of 1974, P.L. 93-406 22

Railroad Retirement Act of 1937, 45 U.S.C. § 228a 22

Railway Labor Act, 45 U.S.C. § 151 et seq. 16, 18, 19, 20

Social Security Act, Title 42 U.S.C. 22

War Labor Disputes Act, 57 Stats. 163, Ch. 144 22

LEGISLATIVE HISTORY

The Legislative History of the National Labor Relations Act 21, 22, 23

TREATISES

8 Collier on Bankruptcy ¶ 3.15 11

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, A.F.L. - C.I.O.,

Appellant-Appellee,

-against-

KEVIN STEEL PRODUCTS, INC.,

Appellee-Appellant,

-and-

NATIONAL LABOR RELATIONS BOARD,

Intervenor-Appellee.

----------X

Docket No. 74-2154

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE-APPELLANT
KEVIN STEEL PRODUCTS, INC.

INTRODUCTION

This is an appeal brought by Appellee-Appellant, Kevin Steel Products, Inc. (herein Kevin) from the reversal by the District Court of the Bankruptcy Court's order setting aside the executory portions of a collective bargaining agreement. Kevin, under the jurisdiction of the Bankruptcy Court and pursuant to Chapter XI of the Bankruptcy Act, had petitioned the court to assert jurisdiction pursuant to Bankruptcy Act Section 313 and set aside the

executory portions of a collective bargaining agreement. The only viable plan of arrangement that Kevin could realistically submit to the court with any chance of future success was premised upon wages significantly below those mandated by the union contract. Therefore, it became essential for Kevin to petition the Bankruptcy Court to set aside the executory portions of its collective bargaining agreement with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers A.F.L.-C.I.O. (herein Local 455).

The Bankruptcy Court, after ordering (48 a)* and conducting a full hearing (49 a - 357 a) found that the contract was onerous and burdensome (380 a) and granted Kevin's motion to set it aside (380 a). The District Court sustained all findings of fact (395 a) but reversed the decision, implicitly holding that the bankruptcy court had no jurisdiction to set aside collective bargaining agreements.

On August 26, 1974, the National Labor Relations Board (herein NLRB) and Kevin forwarded to this Court a Joint Motion for Entry of Partial Consent Judgment in Docket No. 74-1872, in which Kevin agreed to the entry of a consent judgment by this Court enforcing the NLRB's order with respect to the violations of Sections 8(a)(1) and (3) of the Act and stipulated that it would not contest the NLRB's findings of fact and conclusions of law with respect to the violation of Section 8 (a)(5). Insofar as the effect of enforcement in Docket No. 74-1872 of the NLRB's order

* Denotes pages in Appellee-Appellants Appendix.

remedying the Section 8(a)(5) violation is dependent upon the outcome of Kevin's appeal in Docket No. 74-2154, the bankruptcy proceeding, the NLRB and the Company agreed, along with the recommendation of the District Court (398 a) that enforcement of the Section 8(a)(5) portion of the NLRB's order be held in abeyance pending the outcome of said bankruptcy proceeding. (403 a)

The only issue before this court relates to the bankruptcy court's jurisdiction.

ISSUE

DID THE DISTRICT COURT ERR IN REVERSING THE BANKRUPTCY COURT'S ORDER WHICH SET ASIDE THE EXECUTORY PORTIONS OF A COLLECTIVE BARGAINING AGREEMENT.

FACTS

Kevin is a fabricator of structural steel, and an erector of structural steel (62 a), for use in the construction of buildings and other structures. Kevin was organized around 1968 (61 a). Immediately after going into business, Kevin was organized by Local 417 of the outside iron workers (62 a), whose jurisdiction includes the erection of the fabricated steel at the building site.

Approximately six to eight months later, Kevin entered into a collective bargaining agreement with Local 455 (62 a). Local 455 employees were indoor shopmen who unloaded trucks, fabricated steel, painted and loaded trucks with the fabricated steel (63 a).

Kevin also had a third collective bargaining agreement with the Teamsters Union, covering the picking up of steel and the delivery of the fabricated steel to the construction site (62 a).

Kevin's collective bargaining agreement with Local 455 was for two years, and when the contract expired, Kevin and Local 455 signed a second collective bargaining agreement (64 a) for a three year period, expiring on June 30, 1973.

Prior to June, 1972, Kevin paid members of Local 455 an average hourly rate of $3.25 an hour including fringe benefits and employer contributions (67 a). From July, 1972 to December, 1972, Kevin was required to pay members of Local 455 a total package of an average of $6.27 an hour (66 a). In January, 1973, the collective bargaining agreement obligated Kevin to pay an average hour rate of $7.27 an hour to Local 455 members, including fringe benefits and employer contributions (64 a).

In the period from 1972 until September, 1973, Kevin obtained work by bidding on jobs. Kevin would secure plans from contractors, figure out how much it was going to cost to fabricate, and then bid the price with the contractor (67 a). The bidding was highly competitive, with price being the biggest factor in obtaining the work (68 a).

Kevin's labor costs comprise 48% of the total costs which must be taken into account in estimating a job (71 a). The balance of the costs includes mostly materials. All of the competitors of Kevin paid an average hourly labor cost lower than that which Kevin

was mandated to pay pursuant to the exisiting collective bargaining agreement with Local 455 (71 a, 72 a, 277 a).

Kevin did almost all of its work in Rockland and Orange Counties, and competed against approximately five other shops from the area (69 a). Four of these shops are non-union, and the fifth is organized by the Teamster Union (69 a, 70a). These shops, including the one having a Teamster contract, paid lower wages than Kevin was required to pay under its Local 455 contract.

Kevin also competed and bid against Poughkeepsie Iron & Metal. Although Poughkeepsie was also organized by Local 455, Poughkeepsie enjoyed a collective bargaining agreement with an average shopmen's pay of $1.00 an hour less than that which Kevin was required to pay (77 a). Kevin also bid against shops in Pennsylvania, Massachusetts, Maine and North Carolina (70 a). These shops had lower labor costs than Kevin (72 a, 288 a, 289 a).

In order to attempt to offset the higher labor costs mandated to Kevin by the Local 455 contract, and thereby allow Kevin to nevertheless effectively compete for contracts, Kevin purchased expensive equipment, so as to save on labor, and operate efficiently (72 a). Kevin paid $75,000.00 for a punch machine, and an additional $10,000.00 to install it. However, Local 455 insisted that only the highest paid workers would be allowed to operate the machine, and such workers had to be paid accordingly, even while they were learning how to operate the punch machine. In

such a way, the Union's work policy destroyed any prospective costs savings that might have accrued to Kevin from the use of the machine (73 a, 74 a, 75 a).

In its collective bargaining agreement, Local 455 required that Kevin pay wages that were the same as those paid by New York City employers also covered by Local 455 contracts. This put a great economic hardship on Kevin, in that Kevin competed in the Rockland and Orange County areas against local and outside firms paying lower labor rates (76 a).

Local 455's sister locals, Local 40 and Local 417 of the erector's union recognized the competitive difference between a shop that operates in New York City and one operating in Rockland and Orange Counties. Local 417 does Kevin's outside erecting (62 a). However, Local 417 requires shops outside of New York City (including Kevin) to pay wages that are $2.00 an hour less than what shops in New York City must pay (77 a, 78 a). Thus, Local 417 recognized the economic realities of operating and competing in Rockland and Orange Counties, whereas, Local 455 refused to make any such arrangement or adjustment, much to the harm of Kevin.

Starting in 1972, with a downturn in the economy, and with the resulting increase in competition in the area, Kevin was not able to successfully bid and compete for jobs, and it started to loose work. In 1971, Kevin did business of approximately $1,200,000 in 1972 it did business of approximately $1,500,000, and in 1973 Kevin did business totalling approximately $1,400,000.00 (80 a).

Kevin's income tax returns for the above period, show the economic deterioration, caused by high wages. For fiscal year ending October 31, 1970, Kevin showed a net profit of $15,796.78 (335 a). For the fiscal year ending October 31, 1971 Kevin had a net profit of $15,639.57 (339 a). In the fiscal year ending October 31, 1972, Kevin showed a net loss of $86,371.93 (181 a, 327 a). In the period between November 1, 1972 and January 31, 1973, Kevin lost approximately $83,498.13 (349 a, 350 a, 351 a).

Kevin's financial collapse was further evidenced by its default of a Small Business Administration Loan in March, 1973, due to a lack of money caused by the above losses (183 a, 186 a). Kevin was also caused to become unable to pay the monthly payments on the Thomas Punch Machine (187 a), and by February, 1973 Kevin was seven months behind in its truck rental payments amounting to $5,150.00 (187 a).

By February, 1973 Kevin did not have enough money to make payments to Local 455's Pension and Welfare funds. Local 455 then picketed Kevin until all such outstanding money was paid in full (99 a).

On June 30, 1973 the contract with Local 455 expired. Local 455 demanded that Kevin sign a contract in which inside shopmen finishers would receive a total wage of $6.90 an hour and $7.40 an hour as of July 1, 1974 (262 a). Local 455's contract also called for mechanics being paid $6.25 an hour in June, 1973 and $6.70 an hour as of July 1, 1974 (263 a). In addition, fringe

benefits of 30% of the hourly wage must be added on to the above hourly wages, in order to show the total cost per hour each employee must be paid.

Thus, a finisher would currently cost Kevin a total of wages and benefits of $9.55 an hour, and mechanics a total of $8.90 an hour.

On September 9, 1973, Kevin filed for reorganization under Chapter XI of the Bankruptcy Act.

In an order dated November 21, 1973 an NLRB Administrative Law Judge ordered Kevin to execute a two year collective bargaining agreement with Local 455, retroactive to July 1, 1973 and calling for wages and fringe benefits, as set forth above: $9.55 an hour for finishers and $8.90 an hour for mechanics (9 a - 27 a). It is this collective bargaining agreement that Kevin seeks to reject, pursuant to Section 313 of the Bankruptcy Act.

Since July 1, 1973 Kevin has recruited and employed a work force at wages and fringes totalling less than that dictated by the above collective bargaining agreement. Kevin is currently paying an average wage of $5.25 an hour (83 a). This is approximately one-half the average wage, including benefits, that Kevin would be required to pay under the collective bargaining agreement with Local 455. Considering the fact that labor constitutes 48% of the total cost involved in estimating a job, the labor cost saving is highly significant. Furthermore, Kevin has been able to recruit employees to work at wages lower than the union contract (84 a, 85 a, 86 a) despite the contention of Local 455 that Kevin could not

attract proper workers at less than union rates (253 a, 254 a, 261 a).

By operating with labor costs below those required by the Local 455 contract, since filing under Chapter XI, Kevin has been successful in obtaining contracts and making a profit (88 a). With Local 455 wage rates, this would not have been possible (90 a).

On June 5, 1974 Kevin submitted a Plan of Reorganization to the Bankruptcy Court. This plan has been accepted by the creditors, subject to Kevin being successful in setting aside the executory collective bargaining agreement. If Kevin is required to reinstate the collective bargaining agreement that was ordered rejected by the Bankruptcy Judge, and thereby be required to pay the higher union wage costs, rather than its present lower rates, then Kevin will be forced into bankruptcy.

The very fact that Kevin now enjoys lower wage rates without the union contract contributes significantly to the future prosperity of Kevin, and the high likelihood that the plan of reorganization will be successful. This is in effect conceded by Local 455, when it complains that Kevin's lower labor costs gives it an advantage over the rest of the industry (258 a).

In fact, Local 455 cares little if Kevin can proceed with a successful plan of reorganization or whether Kevin goes bankrupt (268 a, 269 a).

Significantly, Kevin has not attempted to reject its executory contract with the Teamster Union or with Local 417. The

fact is that both of these contracts are reasonable and competitive. Neither the Teamster contract nor Local 417's contract with Kevin are onerous, such as to cause the economic destruction of Kevin, as is the Local 455 contract. It is for that reason only, that Kevin seeks to reject the executory Local 455 contract. Also, Local 455's certification as the exclusive bargaining agent for Kevin employees will not be altered even if the contract is rejected.

Local 455 wants to reinstate its contract regardless of the economic consequences to Kevin, because it is to Local 455's own advantage to do so. The Bankruptcy Judge properly applied Section 313 of the Bankruptcy Act, thereby making a plan of reorganization possible, and allowing Kevin to remain in business, as well as permitting the creditors a chance to recover money owed to them.

POINT

THE DISTRICT COURT ERRED IN REVERSING THE ORDER OF THE BANKRUPTCY COURT WHICH SET ASIDE THE EXECUTORY PORTIONS OF A COLLECTIVE BARGAINING AGREEMENT.

The District Court erred in reversing the Order of the Bankruptcy Judge, which had permitted Kevin to reject an executory collective bargaining agreement with Local 455. Section 313(1) of the Bankruptcy Act 11 U.S.C. § 713(1) provides that

> Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it:
> 1. permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;

There is no restriction on the type of executory contract that may be rejected. In Re. Klabber Bros., Inc. 173 F. Supp. 83 (S.D. N.Y. 1959). American Anthracite & Bituminous Coal Corp. vs. Leonardo Arrivabene S.A., 280 F. 2d 119 (2nd Cir. 1960); 8 Collier on Bankruptcy ¶3.15.

Corporations in arrangement proceedings before the bankruptcy court, frequently petition the court to invoke its Section 313 jurisdiction and powers, and set aside the executory portions of contracts. Bankruptcy judges have, upon a proper showing, set aside executory contracts, and their decisions have been sustained, C.F. In Re Miracle Mart Inc. 396 F. 2d 57 (2nd Cir. 1968), even when these contracts are collective bargaining agreements Klabber, supra. In the instant proceeding Kevin moved before the Bankruptcy

Court for an order to cancel and reject the unexpired portion of an executory collective bargaining agreement which Kevin had with Local 455.

The Bankruptcy Judge, ordered a full hearing including the submission of evidence and the taking of testimony (48 a). At the conclusion, the Bankruptcy Judge found that the executory contract between Kevin and Local 455 imposed upon Kevin a burdensome and onerous obligation, which impaired Kevin's chances for filing a successful plan of arrangement. The Bankruptcy Judge granted Kevin's motion to reject the unexpired portions of the contract (358 a - 380 a), pursuant to Bankruptcy Act Section 313 (1). This decision was in conformance with the settled law in the Southern District.

On appeal, the District Court agreed with the Bankruptcy Court's findings that the collective bargaining agreement was sufficiently burdensome and onerous to the debtor to warrant its rejection under 11 U.S.C. § 713, (395 a). Yet the District Court reversed the bankruptcy court and rejected every precedent on point in so doing (392 a, 398 a).

Until the within case, Federal Courts had consistently recognized their power to reject the executory provisions of collective bargaining agreements. Thus, it had been held that Section 116 of the Bankruptcy Act (11 U.S.C. § 516) authorizes a judge in a proceeding for corporate reorganization to permit the rejection of executory contracts of the debtor, including collective bargaining agreement,, In Re Public Ledger 63 F. Supp 1008 (E.D. Pa 1945) (reversed on grounds not germaine to the question of the power of the

reorganization court in a proper case being authorized to reject a labor contract 161 F. 2d 762 (3rd Cir. 1946).)

In Carpenters Local 2746 vs. Turney Wood Products Inc., 289 F. Supp 143 (W.D. Ark 1968), the court held that a Section 70b of the Bankruptcy Act (11 U.S.C. § 110 b) authorizes a trustee in bankruptcy to reject executory contracts upon assuming control of the business of the bankrupt including a union's collective bargaining agreement. The Court specifically rejected the union's claim that Federal Labor Law would exclude collective bargaining agreements from the trustee's powers.

Interestingly, in a related case, the same court pointed out that: "Conceding that the Trustee had a right to reject the contract, the Board says he was still required to operate under its terms while bargaining with the Union for a new contract..." The Court further pointed out that the Board's Trial Examiner, in his decision, assumed that the Trustee had a right to reject the collective bargaining agreement. Durand vs. NLRB 296 F. Supp 1049, 1056 (W.D. Ark 1969).

In In Re Mamie Conti Gowns Inc., 12 F. Supp 478, 480 (S.D.N.Y. 1935), a corporate reorganization arising under the predeceasor (to the Chandler Act) Bankruptcy Act, the court recognized its power and authority to set aside a collective bargaining agreement,

but chose not to exercise its powers in that case on the ground that the corporation had not substantiated its claim that its labor expenses were out of all proportion to the volume of business and that no feasible plan of reorganization providing for a fair prospect of profit could be put forward as long as the contract remained in force. A significant factor in the court reaching its decision was:

> "Considering the disproportion of assets over liabilities as stated in the debtor's petition, I am not wholly satisfied that this entire proceeding under Section 77B was begun to promulgate and consumate a plan of reorganization, and not to discard, by order of a court this particular contract."

The law in the Southern District was well settled by Judge Levet in In Re Klabber, 173 F. Supp. 83 (S.D. N.Y. 1959), where he held that a Referee in Bankruptcy did not abuse his power in ordering the rejection of a collective bargaining agreement pursuant to Section 313(1) of the Bankruptcy Act (11 U.S.C. § 713(1). After citing the Referee's statement that:

> "The Bankruptcy Act makes no distinction among classes of executory contracts. The power to permit rejection of an executory contract should be exercised where rejection is to the advantage of the estate. Where the contract is detrimental, its rejection should be permitted."

Judge Levet held that "there should be no differentiation in the treatment of executory employment or collective bargaining contracts as to termination under the circumstances of this case."

The argument was raised, as in the case at bar, that the referee in bankruptcy is deprived of the power to permit rejection of executory union contracts by Section 15 of the Labor Management Relations Act of 1947 (29 U.S.C. 165) which, in case of conflict, makes its provisions prevail over Section 272 of the Bankruptcy Act (11 U.S.C. § 672). Section 272 pertains to the rights of employees or job applicants to engage in or refrain from union activities and to the duty and power of the judge to terminate any agreement restricting or interfering with that right. The court rejected this argument holding that the power of the referee in bankruptcy to reject an executory union contract is derived from Section 313 of the Bankruptcy Act (11 U.S.C. § 713) which is not mentioned in, and therefore is outside the scope of Section 15 L.M.R.A. (29 U.S.C. § 165).

More recently Judge Ray fiel in Matter of Overseas National Airways 238 F. Supp. 359 (E.D.N.Y. 1965) recognized the power of a Bankruptcy Court to reject the executory portions of a collective bargaining agreement, on a proper showing of proof, pursuant to Section 313 of the Bankruptcy

Act (11 U.S.C. § 713). In this case, however, the court held that the referee in Bankruptcy lacked the authority to disaffirm the collective bargaining agreement without utilizing the notice and conference requirements of the Railway Labor Act. (45 U.S.C. § 151 et seq.) Section 77 (n) of the Bankruptcy Act (11 U.S.C. 205 (n), the section under which the referee acted, specifies that no judge or trustee may change the wages or working conditions of railroad employees except in the manner provided in the Railway Labor Act.

Bankruptcy Judge Babitt, in In The Matter of Business Supplies Corporation of America 73 B 73, 72 LC ¶ 13,940 (S.D. N.Y. September 7, 1973), after stating that In Re Klabber Brother, supra was binding upon him as a Referee in Bankruptcy for the Southern District of New York, granted the debtor's application to reject the collective bargaining agreement, pursuant to Section 313.

Many of these precedents were recognized as valid and binding by the NLRB in its papers before the Bankruptcy Judge (37 a - 45 a). An Administrative Law Judge of the NLRB also recognized the power of the Bankruptcy Court to set aside executory portions of collective bargaining agreements. The NLRB expressly elected to neither adopt or pass upon this position. Sunderland's Incorporated 194 NLRB 118, 125 (1971)

The District Court below ignores all of the above cited holdings and decisions, in reversing the Bankruptcy Court Judge, and in rejecting all of the existing cases which have previously supported the Bankruptcy Judge's position.

The District Court holds that a Bankruptcy Judge has no authority under the Bankruptcy Act to set aside an executory collective bargaining agreement.

The District Court, in its decision, alludes to the fact that the Bankruptcy Act specifically precludes a Bankruptcy Judge from setting aside executory contracts pertaining to Railway Labor Act collective bargaining agreements. Yet, the Bankruptcy Act is silent as to prohibiting a Bankruptcy Judge from setting aside industrial executory collective bargaining agreements.

In order to explain away the specific prohibition pertaining to the setting aside of Railway Labor Act executory contracts, and the absence of such a prohibition as regards industrial executory collective bargaining agreements, the District Court concludes that such an absence relating to industrial collective bargaining agreements "is explainable as legislative oversight" (397 a).

> "In the last analysis it seems more logical to assume that the Congress intended to distinguish collective bargaining agreements as a class from all other contracts than that it intended to make seemingly irrelevant distinctions between different kinds of labor agreements." (397 a)

It is submitted that the District Court holding, as well as the rational behind the decision, is erroneous. Since enactment of the Railway Labor Act, 45 U.S.C. § 151 et seq., Congress has intentionally differentiated between employees covered by the Railway Labor Act and general industrial employees.

The Railway Labor Act, 45 U.S.C. § 151 et seq., established procedures for resolving disputes between carriers and their employees, and thereby avoiding work stoppages. The purpose of the Railway Labor Act was to stabilize a vital industry that had been disrupted by crippling strikes and work stoppage. The Act contained extensive and complex mediation and arbitration procedures, designed to keep labor and management talking to each other regarding disputes, while at the same time the workers continued on the job. It was believed that anything that interferred with this stability jeopardized this intricate structure of negotiation and discussion.

Thus, the Bankruptcy Act specifically prohibited a Bankruptcy Judge from setting aside an existing collective bargaining agreement involving a railroad, for fear of the chaos that might follow. This prohibition prevented a Bankruptcy Judge from interferring with a railroad collective bargaining agreement, even though the contract might be onerous and burdensome to a railroad in reorganization. The rational for such a prohibition was that the railroad would have to live with its onerous contract, rather than allow labor strife to develope. In such a manner, the public

interest in keeping a railroad operating without strikes, became superior to any inclination of a Bankruptcy Judge to set aside a collective bargaining agreement that might be burdensome and onerous to an economically distressed railroad.

This is not the case regarding collective bargaining agreements involving non-railroad employers. Here, the purpose of the Bankruptcy Act, and its Chapter on arrangements, is to rehabilitate businesses as well as to protect creditors. The essential requirement that labor-management peace exist at almost any cost is absent. In such a way, the Bankruptcy Judge is not prohibited from setting aside an executory collective bargaining agremeent, if such an agreement is onerous and burdensome to the debtor, and if without such an agreement, a plan of reorganization becomes possible and the creditors protected. If this causes a strike and picketing by the employees formerly covered by the executory collective bargaining agreement that was set aside, then this will be tolerated, unlike in a railway carrier situation.

In such a manner, the Bankruptcy Judge's act of setting aside Kevin's collective bargaining agreement in no way affects the certification of Local 455 as the exclusive bargaining agent. The union can approach Kevin in the same manner as it did prior to the signing of a collective bargaining agreement, and negotiate a new contract. If Kevin refuses to enter into a new contract, the union could strike and picket, in the same manner as if there had not been a Chapter XI petition pending. This could not be accepted in a railroad situation.

Thus, the Railway Labor Act by necessity prohibits a Bankruptcy Judge from interferring with a collective bargaining agreement. No such prohibition exists in the Bankruptcy Act regarding non-carriers, because no such prohibition was deemed necessary by the Congress, and a Bankruptcy Judge has the power to set aside a collective bargaining agreement.

Had Congress intended to exclude all collective bargaining agreements from the operation of Section 313 (1) it would surely have so stated. The Legislative History of the National Labor Relations Act and the various amendments to the Bankruptcy Act support this conclusion. This conclusion is re-enforced when it is observed that Section 77(n) of the Bankruptcy Act [(11 U.S.C. 205(n). This section is substantially the same as 77(o) of the Bankruptcy Act of 1898)] specifically prohibits the bankruptcy court from interferring with collective bargaining involving carriers the employee of which are subject to the provisions of the Railway Labor Act (45 U.S.C. § 151 et seq.). See In Re Overseas National Airways, 238 F. Supp. 359 (E.D. N.Y. 1965). Section 77 of the Bankruptcy Act of 1898, dealing with reorganization of railroads engaged in interstate commerce provides in sub-section (o)

> No judge or trustee acting under his title shall change the wages or working conditions of railroad employees, except in the manner prescribed in sections 151 to 163 of Title 45,

> or as set forth in the memorandum of agreement entered into in Chicago, Illinois, on January 31, 1932, between the executives of twenty-one standard labor organizations and the committee of nine authorized to represent Class 1 railroads. 47 Stat 1474, added to the Bankruptcy Act of 1898, March 3, 1973, Public Law No. 420.

Section 77 B of the Bankruptcy Act, added approximately one year later, dealing with corporate reorganizations (73rd Cong. Public Law No. 251) omits any prohibition against judges or trustees changing the wages or working conditions of employees.

In 1935, Congress debated the proposed National Labor Relations Act. The legislative history of said act, House Report No. 972 on S. 1958, clearly shows the intention on the part of Congress to differentiate between the two types of labor relations, railway and industrial. Thus the report states:

> Objection is constantly made that the bill is limited to unfair labor practices by employers. It is contended that the bill should prohibit "anyone", including of course, an employee or labor organization, from interfering with, restraining or coercing employees in the exercise of these rights, and that without such provision, the bill is "unfair", "one-sided", and would lead to the domination of industry by organized labor. But it is clear that corresponding to the right of employees to be free from interference, etc., by their employer in their organizational activities, is the right of the other party to the negotiations, the employer, to be free in his designation of representatives for that purpose. The Railway Labor Act contains such a reciprocal provision that neither employers nor employees shall in any way interfere with, influence, or coerce the other in their choice of representatives (sec. 2 (3)), but does not deal with organizational activities by employees or labor organizations. Such a reciprocal provision, forbidding employees to interfere with the right of employers to

> choose their representatives for collective bargaining, would be a merely formal requirement, ignoring the realities of the situation. In the light of common knowledge, it can hardly be said that this right of employers needs protection under this bill. Organizations of employers in trade associations and in national organizations of such trade associations, have blanketed the country; the integration of business into larger corporate units and the formation of such trade associations has not been stopped by the antitrust laws. 1113-14

The War Labor Disputes Act, 57 Stats. 163, Ch. 144, is another example of Congress creating distinctions between Railway Labor and other labor collective bargaining agreements. Section 7 (a) (2) of said act empowers the National War Labor Board to settle collective bargaining disputes in industries that may lead to substantial interference with the war effort. Section 7(3) prohibits the War Labor Board from acting with respect to any matter within the purview of the Railway Labor Act.

The Railroad Retirement Act of 1937, 45 U.S.C. 2289, The Social Security Act, Title 42 U.S.C., The Fair Labor Standards Act § 13 (b)(2),29 U.S.C. § 213 (b)(2) and the Pension Reform Act of 1974, PL 93-406 are a few of the numerous instances where Congress has seen fit to distinguish railway personnel from that of the industrial worker.

The Legislative History of the National Labor Relations Act, (G.P.O. 1949) further repudiates the Congressional oversight argument so heavily relied upon by the District Court. The draftsmen of the National Labor Relations Act specifically refer to Bankruptcy Act 77 (o) in their committee report. Thus Senate Committee Print

Comparision of S. 2926 (73d Congress) and S. 1958 (74th Congress) at pp. 1350-1351 states

> "Section 7: This Section while newly added in S. 1958, is nothing more than a verbatim recital of various rights granted employees under Section 7(a) [for the National Industrial Recovery Act]....Comparable provisions are found in various other Federal statutes.
>
> * *
>
> Emergency Transportation Act, Section 7(e): Carriers whether under control of a judge, trustee, receiver, or private management, shall be required to comply with provisions of the Railway Labor Act and with provisions of Section 77, paragraphs (o) (p) and (q) of the amendments to the Bankruptcy Act."

The District Court opinion is also based upon a mis-statement of law. The court states: "The National Labor Relations Act, on the other hand, provides that no collective bargaining agreement can be set aside except pursuant to the provisions of that law, which provisions where concededly not followed in the case at bar" (395a-396a). No authority for this proposition is given.

The National Labor Relations Act Section 8(d), (29 U.S.C. 158(d)) prohibits a party to a collective bargaining agreement from terminating or modifying such contract unless certain enumerated prerequisites are followed or the termination or modification is by mutual consent. The Act does not prohibit the bankruptcy court, or a Federal Administrative Agency from modifying or terminating a collective bargaining agreement. Thus with only implicit congressional authority, (Economic Stabilization Act of 1970, 12 U.S.C. § 1904-note) the Cost of Living Council and the Pay Board altered, amended

and modified executory collective bargaining agreements and their actions have been sustained by the court. IBEW Local 11 vs. Boldt, 475 F. 2d 1204 (T.E. C.A. 1973); Amalgamated Meat Cutters vs. Connally, 373 F. Supp. 737 (D.D.C. 1971).

In an analagous situation, the District Court held that the Bankruptcy Court was not a "person" within the Emergency Price Control Act of 1942, 50 U.S.C. App. § 901 et seq and was not precluded from authorizing disaffirmance of an executory contract, in a manner other than that prescribed by Section 902 of said Appendix and regulations issued under it. In Re Freeman, 49 F. Supp. 163 (D.C. Ga. 1943); In Re 325 East Seventy-Second Street Inc., 57 F. Supp. 684 (S.D. N.Y. 1944).

It must be concluded that the failure of the Congress to specifically prohibit a Bankruptcy Judge from setting aside a non-railroad collective bargaining agreement was deliberate and intentional. The District Court's "assumption" to the contrary, the Bankruptcy Judge is not specifically prohibited and does in fact possess the authority to set aside the collective bargaining agreement in the instant case.

CONCLUSION

The District Court order reversing the Bankruptcy Judge's order must be reversed, and the order of the Bankruptcy Judge setting aside the collective bargaining agreement must be reinstated.

Respectfully submitted,

GUAZZO, SILAGI & CRANER, P.C.

By: Mitchel B Craner
A member of the firm

Attorneys for Appellee-Appellant
Kevin Steel Products, Inc.
888 Seventh Avenue
New York, New York 10019
(212) 757-7100

MITCHEL B. CRANER
STEPHEN E. KLAUSNER
Of Counsel

SERVICE OF 2 COPIES OF THE WITHIN

Brief

IS HEREBY ADMITTED.

DATED: DEC 4, 1974

Sypser Weinstock Hauser + Dorn

Attorneys for appellant - appellee
Stagmens Local Union # 455

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On December 4-th, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Sandy McCandless, Special Litigation National Labor Relations Board the attorney for the ~~respondent~~ APPELLEE by ~~leaving~~ mailing ~~three~~ five copies thereof ~~at~~ in his office located at 1717 Pennsylvania Avenue, N.W. Washington, D. C. 20570

Bert Myers

Sworn to before me this 4th day of December. 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 41-8317
Qualified in Bronx County
Term Expires March 30, 1976